Supreme Court, U.S.
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No. 06-1086

IN THE

Supreme Court of the United States

ROBERT L. JORDAN,

Petitioner

v.

ALTERNATIVE RESOURCES CORPORATION, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review petitioner's retaliation claim when the lower courts identified and applied the legal standard for discriminatory retaliation that has been used by this Court, and that has been accepted by every circuit.

2. Whether this Court should review the dismissal of a claim for race-based termination when the complaint alleges a motive other than race for the termination and relies on facts from which a race-based motive may not properly be inferred.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the respondents provide the following corporate disclosures.

Respondent Alternative Resources Corporation ("ARC") is not a publicly traded corporation. More than 10 percent of ARC's stock is owned by its parent company, Pomery IT Solutions, Inc., which is publicly held.

Respondent International Business Machines Corporation ("IBM") is a publicly traded corporation. It has no parent company, and no publicly traded company owns 10 percent or more of IBM's stock.

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BRIEF IN OPPOSITION

Respondents Alternative Resources Corporation ("ARC") and International Business Machines Corporation ("IBM") respectfully request that this Court deny the petition for a writ of certiorari filed by petitioner Robert L. Jordan, seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 14, 2006. As explained below, the Fourth Circuit's judgment was grounded in well-established law, was compelled by applicable statutory language, raises no conflict with decisions of other circuits or this Court, and presents no issue that warrants review by this Court.

STATUTE INVOLVED

This case involves the "opposition clause" of section 704(a) of Title VII of the Civil Rights Act of 1964, which provides in pertinent part:

> (a) . . . . It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [the employee or applicant] has opposed any practice *made an unlawful employment practice* by this [Title] . . . .

42 U.S.C. § 2000e-3(a) (emphasis added).

STATEMENT

This case arises from the dismissal, under Fed. R. Civ. P. 12(b)(6), of a complaint in which Jordan alleged that ARC and IBM retaliated against him in violation of the "opposition clause" of section 704(a) of Title VII of the Civil Rights Act of 1964, and from Jordan's unsuccessful attempt

to amend his complaint to add a claim that he was discharged because of his race. Jordan's claims stemmed from the termination of his employment at an IBM facility in Gaithersburg, Maryland, where Jordan worked as an at-will employee. Jordan alleges that IBM and ARC were his joint employers. *See* Pet. App. at 3a.

According to the complaint, Jordan's termination arose from the following events. On October 23, 2002, Jordan and an IBM nonsupervisory co-worker, Jay Farjah, were both in a room at work, watching a television report of the capture of the D.C. area sniper suspects. In response to the report, Farjah made a crude, racially derogatory, comment about the suspects. The comment was not directed to Jordan, but he overheard it and was offended. Jordan told several co-workers about the incident, and then reported it to IBM and ARC. In response, IBM conducted an investigation and interviewed Farjah, who denied using the words that Jordan reported, although he acknowledged making an inappropriate statement. After making his report, the complaint alleges, Jordan began to experience difficulties at work and was terminated about one month later. *See* Pet. App. at 4a. Jordan alleges that his termination was causally connected to his report of Farjah's remark.

IBM moved to dismiss Jordan's complaint, asserting that, on the facts alleged, Jordan's report was not protected by section 704(a) because he could not have held an objectively reasonable belief that, by reporting the Farjah statement, he was opposing an unlawful employment practice--the legal standard used in the Fourth Circuit and, as discussed below, in every other circuit and by this Court. ARC joined in the motion.

Following a hearing, Jordan sought leave to amend his complaint to add, among other things, a race

discrimination count under 42 U.S.C. § 1981 in which he incorporated his allegations regarding retaliation and asserted that "race was a motivating factor" in his termination. *See* Pet. App. at 17a. On March 30, 2005, the district court dismissed Jordan's complaint, with prejudice as to the retaliation claim, concluding that Jordan's report was not protected by section 704(a) because he could not establish that he had an objectively reasonable belief that an unlawful employment practice had occurred. *See* Pet. App. 63a-66a. The district judge denied Jordan's motion to amend his complaint to add the race discrimination claim, as framed in his proposed amended complaint, but invited him to amend again to assert facts supporting his allegation that his race played a role in his discharge. *See* Pet. App. at 70a, 82a (Opinion), 79a (Order). Jordan declined to amend, electing to stand on his allegations in the proposed amended complaint. The district judge directed the clerk to close the case, and an appeal to the Fourth Circuit ensued.

On May 12, 2006, a divided panel of the Fourth Circuit entered an opinion and order affirming the district court, agreeing that Jordan was not entitled to protection under section 704(a) because he could not have reasonably believed that, by reporting a single racist remark by a nonsupervisory employee, about a matter that had occurred outside of the workplace, he was opposing illegal conduct. The panel also concluded that Jordan's section 1981 claim was insufficiently pleaded under Supreme Court and Fourth Circuit precedent. Judge Niemeyer wrote the opinion for the panel majority, in which Judge Widener joined; Judge King dissented. *See Jordan v. Alternative Res. Corp.*, 447 F.3d 324 (4th Cir. 2006).

Jordan petitioned for rehearing, and on July 5, 2006, the petition was granted and the May 12 opinion and order were vacated. *See Jordan v. Alternative Res. Corp.*, 2006

App. LEXIS 16794 (4th Cir. July 5, 2006). On August 14, 2006, the panel issued a new opinion that, again, affirmed the district court. Judge Niemeyer again wrote the opinion for the majority, and Judge King again dissented. The August 14 opinion again concluded that Jordan could not have reasonably believed that his report of Farjah's comment was protected. In explaining the majority's position, Judge Niemeyer discussed the "reasonable belief" standard, citing Fourth Circuit precedent, *see* Pet. App. at 7a-8a, and noted that the only conceivable unlawful conduct raised by the allegations in the complaint was a possible "hostile work environment," *see* Pet. App. at 9a. He pointed out that an actionable hostile work environment required conduct so severe and pervasive as to change the terms and conditions of the victim's employment, citing this Court's opinions in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See* Pet. App. at 8a. Based on that authority, he concluded that the co-worker's isolated outburst, not aimed at Jordan and not about anything related to the workplace, could not have created a hostile work environment, and that Jordan's alleged belief to the contrary was unreasonable, as a matter of law. *See* Pet. App. at 9a-16a. In dissent, Judge King argued that Jordan's belief that a hostile work environment existed was not unreasonable, *see* Pet. App. at 33a-35a. In addition, Judge King argued, the "reasonable belief" standard was inapplicable in light of this Court's opinions in *Ellerth* and *Faragher*, apparently believing that the encouragement in those cases for early reporting of harassing conduct somehow eviscerated the statutory requirement that the conduct complained of be unlawful. *See* Pet. App. at 35a-38a.

Jordan petitioned for rehearing *en banc*. The petition was denied, on a five-to-five vote, *see* Pet. App. at 49a, and Judges Niemeyer and King again issued opinions supporting

their respective positions, *see* Pet. App. at 49a-57a. On the section 704(a) issue, Judge Niemeyer addressed what Jordan, and Judge King, perceived as a conflict between the reasonable belief standard and the *Ellerth* line of cases, observing that the two can and do work in harmony and, together, provide ample protection for those who report harassing conduct. *See* Pet. App. 52a-53a. Jordan filed his petition for writ of certiorari on February 1, 2007.

REASONS FOR DENYING PETITION

The Fourth Circuit held that Jordan was not entitled to protection under section 704(a) because he was not opposing activity that was itself a violation of Title VII (that is, a hostile work environment) and, more importantly, that Jordan could not have had a "reasonable belief" that the activity he was opposing was illegal. *See* Pet. App. at 11a-12a. A reader of Jordan's petition might conclude that the Fourth Circuit created the "reasonable belief" standard out of whole cloth, and that the standard has no place in Title VII jurisprudence. *See, e.g.*, Pet. at 7 (as a result of the decision below, "workers *in the Fourth Circuit* face an intolerable conundrum" because of "the *Fourth Circuit's crabbed interpretation* of section 704(a)") (emphasis added). By suggesting that the Fourth Circuit stands alone in its reading of section 704(a), and that its reading is incorrect, the petition seriously mischaracterizes the legal underpinning of the ruling below.

In fact, and as discussed *infra* in part I, the "reasonable belief" standard for determining whether an employee is opposing activity "made an unlawful employment practice" under Title VII, as proscribed by section 704(a), has been a part of the law of discriminatory retaliation for 30 years, has been adopted by every circuit, and was applied by this Court in 2001 to affirm summary

judgment in favor of the employer in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*).

Jordan's petition ignores this important history, except for a brief attempt to denigrate *Breeden*, and a fleeting reference to decisions of "some other lower courts." *See* Pet. at 17-19. Rather, Jordan argues that the Fourth Circuit's decision (and, thereby, the entire body of retaliation law) is in conflict with an alleged policy found in four Supreme Court cases, two of which preceded *Breeden*, and only one of which deals with the law of retaliation--albeit a different aspect of that law. The petition argues that the "first" complaints of discrimination, even those made by employees who could not reasonably believe that they were opposing a practice made illegal under Title VII, are entitled to protection because *Burlington Industries, Inc. v . Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), all "encourage" early reporting of harassing conduct, *see* Pet. at 10, 18 and because *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____, 126 S. Ct. 2405 (2006), calls for a "broad" reading of section 704(a), *see* Pet. at 16. But *Ellerth* and its progeny do not require an immediate report of every workplace impropriety, and the policy underlying those cases is not in conflict with the law of retaliation. As Judge Niemeyer concluded, and as discussed *infra* in part II, the two lines of authority work together, and have operated in harmony for years. There is no issue that requires this Court's review.

The second question presented in Jordan's petition--the sufficiency of the race discrimination claim under section 1981--is a fact-bound dispute that does not warrant review because, among other things, Jordan misconstrues the holding below. The issue there was not whether Jordan's bald allegation of a race-based motive for his termination

was sufficient. Rather, the question was what happens when a complaint alleges facts, purportedly to support an improper motive, that do not support, and indeed tend to refute, that alleged improper motive. As discussed *infra* in part III, dismissal of such a complaint is appropriate. Further, the district court offered Jordan an opportunity to amend and he declined. *See* Pet. App. at 19a. Jordan presents no issue that needs this Court's review.

I. THERE IS NO CONFLICT: THE FOURTH CIRCUIT IDENTIFIED, ARTICULATED, AND APPLIED THE LEGAL STANDARD FOR DISCRIMINATORY RETALIATION EMBRACED BY EVERY CIRCUIT, AND APPLIED BY THIS COURT.

The Fourth Circuit applied the reasonable belief standard and held that Jordan did not meet it--concluding that Jordan could not have reasonably believed that the isolated co-worker's statement, not directed to Jordan, and not related to the workplace, created an unlawful hostile work environment. The petition does not challenge the Fourth Circuit's holding that, on the facts alleged, Jordan did not have a reasonable belief that he was reporting conduct made unlawful by Title VII. Instead, it challenges the validity, or vitality, of the reasonable belief standard. Jordan argues that protection should be afforded to employees "who complain about the first (or early instances) of racial or sexual abuse." *See* Pet. at 8-9. Jordan's proposal is confusing because it does not propose any alternative to the reasonable belief standard, leaving it unclear when protection is to be triggered. But no matter how one interprets Jordan's vague proposal, he would apply it even in situations where the conduct was not illegal (contrary to the plain language of the statute) and where the employee did not have a reasonable belief that illegal conduct had occurred

(contrary to the case law of every circuit, and the law that has been applied by this Court).

Title VII broadly proscribes discrimination in the workplace based on race, and on other protected classifications. Consistent with that proscription, section 704(a) protects employees who "oppose" illegal discrimination from "retaliation" by their employers on account of that "opposition." Congress used clear language to apply the protection only to those who have "opposed any practice *made an unlawful employment practice* by this [Title] . . . ." 42 U.S.C. § 2000e-3(a) (emphasis added).[1] The meaning of "unlawful employment practice" is found in the prior section of Title VII, section 703(a), which makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Thus, before an employee is entitled to protection from retaliation for opposing inappropriate conduct by, or imputed to, the employer, the underlying conduct must constitute illegal discrimination as defined by section 703(a).

Courts that initially applied the "opposition clause" interpreted literally the language of section 704(a), requiring plaintiffs to allege and prove that the conduct they were opposing was, in fact, illegal under section 703(a). *See, e.g., Equal Employment Opportunity Comm'n v. C&D Sportswear Corp.*, 398 F. Supp. 300 (M.D. Ga. 1975), and cases cited therein.

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[1] Section 704(a) also prohibits retaliation against those who make "a charge, testif[y], assist[], or participate[] in" a Title VII proceeding. This prohibition, referred to as the "participation clause," has proof requirements different from those of an "opposition" claim. The parties agree that this is an "opposition clause" case.

In 1977, the district court in Minnesota concluded that this literal reading was inconsistent with the broad remedial purposes of Title VII. *Hearth v. Metro. Transit Comm'n*, 436 F. Supp. 685 (D. Minn. 1977). Expressing concern that the literal reading of the statute created a chilling effect on employees who would otherwise report what they, perhaps wrongly, perceived as illegal discrimination, the court broke with existing authority. It held that "as long as the employee had a reasonable belief that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." *Id.* at 688. The next year, the Ninth Circuit adopted the *Hearth* reasoning. *See Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 (9th Cir. 1978).

By 2001, the "reasonable belief" standard had been embraced by every circuit except the Tenth Circuit,[2] which

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[2] *See, e.g., Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (citing *Sias*, "claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII"); *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (plaintiff need show only that he acted under a good faith, reasonable belief that a violation existed); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990) (plaintiff must show she had a reasonable belief that her employer was engaged in an unlawful employment practice); *Mayo v. Kiwest Corp.*, 1996 U.S. App. LEXIS 20445, *13-14 (4th Cir. Aug. 15, 1996) (unpublished) (plaintiff "need[s] to have objectively reasonable belief that he was the victim of discrimination made unlawful under Title VII"); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000) (plaintiff must have a "reasonable belief that the employer was engaged in unlawful employment practices"); *Dyer v. Cmty. Mem'l Hosp.*, 2006 U.S. Dist LEXIS 6507, *25-26 (E.D. Mich. Feb. 21, 2006) (unpublished) (belief must have been reasonable, suggesting that there must be some objective evidence to support it, citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-13 (6th Cir. 1989)); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980) (employee is protected from

had held that the employee's subjective belief was sufficient. *See, e.g., Love v. Re/Max of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984) (holding that good faith belief is enough).

In 2001, the issue came before this Court in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*) ("*Breeden*"). Ms. Breeden had complained to management because her supervisor and a co-worker (both males) made what she considered to be sexist and offensive comments while the three of them were reviewing applications submitted by prospective employees. She was subsequently fired and brought a retaliation claim under Title VII. The district court entered summary judgment for the employer, but the Ninth Circuit reversed, concluding that Ms. Breeden could have reasonably believed that the comments about which she complained amounted to actionable discrimination. *Breeden v. Clark County School Dist.*, 2000 U.S. App. LEXIS 17564, *3-4 (9th Cir. July 19, 2000).

The Supreme Court reversed and reinstated summary judgment in favor of the employer. Before addressing the merits, the Court commented on the "reasonable belief" standard used by the Ninth Circuit, saying that it expressed

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retaliation for opposing an employment practice that was not yet unlawful but which employee reasonably believed was unlawful, citing *Sias* and *Hearth*); *Evans v. Kansas City Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995) ("a plaintiff must show a good faith reasonable belief that his employer engaged in a discriminatory employment practice"); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994) ("opposition clause protection will be accorded 'whenever the opposition is based on a reasonable belief' that employer has engaged in an unlawful employment practice"); *Little v. United Techns.*, 103 F.3d 956, 960 (11th Cir. 1997) (plaintiff must show a good faith reasonable belief, and "plaintiff's burden under this standard has both a subjective and an objective component"); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) (citing *Sias*, "[o]pposition based on reasonable belief should be protected from retaliation").

no view on "the propriety of this interpretation of [section 704(a)]." *Breeden*, 532 U.S. at 270. Nonetheless, the Court relied on that standard and determined that Ms. Breeden's belief could not have been reasonable. Citing, and quoting from, both *Burlington Industries, Inc. v . Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to provide the legal framework for its reasonableness analysis, the Court concluded that, on the *Breeden* facts and the *Ellerth/Faragher* law, "[n]o reasonable person could have believed that the single incident [alleged by the plaintiff] violated Title VII's standard." *Breeden*, 532 U.S. at 271. Thus, although the Court merely assumed, *arguendo,* the applicability of the reasonable belief standard, it squarely held that, where a reasonable person could not believe that the opposed activity was in violation of Title VII, there could be no claim for retaliation under section 704(a). *Id.*

After this Court's decision in *Breeden*, and continuing through today, every case of which the respondents are aware that has addressed the "made . . . unlawful" language of section 704(a) has applied the reasonable belief standard.[3] Indeed, the Tenth Circuit, the only pre-*Breeden* holdout for a subjective standard, changed its rule, after *Breeden*, to a reasonable belief standard:

> [T]he [Supreme] Court [in *Breeden*] implicitly reject[ed] any interpretation of Title VII [that] would permit a plaintiff to maintain a retaliation claim based

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[3] For very recent post-*Breeden* cases, *see, e.g., Moore v. Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Turner v. Baylor Richardson Med. Ctr.*, 2007 U.S. App. LEXIS 1177, *23 (5th Cir. Jan. 19, 2007); *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006); *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006). *See also* cases cited *infra* at note 7.

> on *unreasonable* good-faith belief that the underlying conduct violated Title VII. Accordingly, the Supreme Court's decision in [*Breeden*] supersedes and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII.

Crumpacker v. Kansas, 338 F.3d 1163, 1171 (10th Cir. 2003) (emphasis in original) (citations omitted).

Pursuant to this clear and unequivocal authority, Judge Niemeyer applied the required standard to the allegations of Jordan's complaint, and held unreasonable Jordan's alleged belief that a hostile work environment was created by the co-worker's isolated, single statement. *See* Pet. App. at 11a-12a. Because Jordan's petition does not challenge that holding, this opposition will not address it, except to make the following observation flowing from Jordan's heavy reliance on Judge King's dissenting opinions.

Jordan's petition quotes Judge King extensively, *see, e.g.*, Pet. at 11, 12, 14-15, and draws much from the fact that four other judges joined in Judge King's dissent regarding the denial of rehearing *en banc*, found at Pet. App. 54a-57a. While those judges, and Judge King, obviously disagreed with the result reached by the panel majority, whether they all would agree that the reasonable belief standard should be

jettisoned, as Jordan argues in his petition, is questionable.[4] Judge King's *en banc* dissent does not mention the reasonable belief standard. Perhaps the dissenters were troubled by the jarring nature of Farjah's alleged comment, and intended to express agreement with the principal thrust of Judge King's first two dissents, in which he concluded that the majority had *misapplied* the reasonable belief standard, and should have found that Jordan's belief was, in fact, reasonable. *See, e.g.*, Pet. App. at 27a, 38a. But that is not the issue presented by the petition here. Indeed, were that the issue, the reasons for denying the writ would be even more obvious, since the misapplication of a correctly stated legal principle is *not* a ground on which this Court generally grants certiorari. *See* Sup. Ct. R. 10.

The dismissal of Jordan's retaliation claims was properly affirmed. And the fact that the Fourth Circuit applied the law of *every* circuit, and the law previously applied by this Court, demonstrates that there is no judicial conflict that warrants this Court's review or involvement.

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[4] All five of the dissenting judges have, within the last two years, authored or joined in opinions expressly applying the reasonable belief standard. *See Equal Employment Opportunity Comm'n v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 2005) (Judges King and Gregory); and *Greene v. A. Duie Pyle, Inc.*, 2006 WL 694377, *2 (4th Cir. Mar. 20, 2006) (*per curiam*) (unpublished) (plaintiff could not have "reasonably believed" that the presence of pornography in the workplace created a hostile work environment) (Judges Wilkins, Michael, and Traxler). In the latter case, the employee raised the issue of a "conflict" between *Ellerth* and the reasonable belief standard. *See* Letter providing supplemental authorities pursuant to FRAP 28(j), *Jordan v. Alternative Resources Corp.*, No. 05-1485 (4th Cir.) (Docket Entry dtd. 3/23/06) (letter from respondents' counsel in this case noting that the "conflict" had been raised in the *Greene* briefing). The Fourth Circuit panel in *Greene* apparently saw no such conflict, unanimously affirming summary judgment in favor of the employer in a *per curiam* opinion.

II. THE LAW OF RETALIATION IS NOT IN CONFLICT WITH *ELLERTH*, *FARAGHER*, *SUDERS*, OR *BURLINGTON NORTHERN*.

In his petition, Jordan asks that the Court grant certiorari in order to rewrite section 704(a) to resolve what he contends is an inconsistency between the standard applied by the Fourth Circuit (and every other circuit court, and this Court in *Breeden*), on the one hand, and the Supreme Court's decisions in *Ellerth, Faragher, Suders,* and *Burlington Northern,* on the other. He cites this Court's decisions in those four cases for the proposition that Title VII encourages "early" reporting of harassing behavior, and from that proposition, he argues that section 704(a) protection must extend even to those who do not reasonably believe that unlawful conduct has occurred. *See, e.g.,* Pet. at 9. As is clear from the discussion *supra* in part I, Jordan's argument is not simply that the decision below is in conflict with those four decisions but, rather, that the entire body of retaliation law is in conflict. But that is not so. There is no conflict. The law of discriminatory retaliation, as applied by this Court in *Breeden*, and by all of the circuits, is consistent with those decisions. Although the law does not protect *every* complaint by an employee, as Jordan urges, the "reasonable belief" standard provides protection for early reports of unlawful employment practices, without completely ignoring the language of the statute that protects only those who oppose "unlawful" conduct. Indeed, as discussed *supra* in part I, the reasonable belief standard was itself judicially created to accommodate the same concerns that Jordan cites as a basis for jettisoning that standard.

A. *Ellerth, Faragher,* and *Suders*.

In *Ellerth, Faragher*, and *Suders* this Court established and explicated an affirmative defense available to

employers in harassment cases who can demonstrate that they acted reasonably to prevent or correct harassing behavior, and that the employee unreasonably failed to use the employer's preventative or remedial instruments. In discussing some of the considerations behind those holdings, the Court observed that "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Ellerth*, 524 U.S. at 764. *See also Faragher*, 524 U.S. at 807; *Suders*, 542 U.S. at 146. From this language, Jordan argues that there exists a policy that "encourages harassment victims promptly to alert their employers to any discriminatory behavior," *see* Pet. at 9, so as to provide section 704(a) protection to the "first" (i.e., *every*) report of inappropriate conduct, *see id.* Those cases say no such thing.

Ellerth, Faragher, and *Suders* each addresses the ramifications of harassment by supervisors,[5] the circumstances under which a supervisor's harassing conduct may be imputed to employers, and the defenses that may be available to employers who do not have notice of the supervisor's behavior. But none of them *requires* "early" reporting, let alone the immediate reporting of every perceived act of misconduct by a co-worker. As Judge Niemeyer observed in his panel opinion below:

> As the law stands, employees are not subject to conflicting incentives. Complaining employees are

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[5] The distinction between supervisor harassment, and the inappropriate conduct of a co-worker, which is alleged in this case, is an important one. As this Court observed in *Faragher*, when a supervisor discriminates against subordinates, his actions "necessarily draw upon his superior position" and implicate the employer; but "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go." *Faragher*, 524 U.S. at 803.

> protected by Title VII once they have an objectively reasonable belief that a Title VII violation has occurred, and they have a reasonable amount of time in which to bring their concern to their employer's attention if they want to protect their right to sue their employers [under *Ellerth/Faragher*]. Only at an impermissibly high level of generality, where meaningful distinctions can no longer be observed, can it be argued that the law inconsistently encourages employees to report and at the same time not to report violations, and Jordan's argument, if accepted, would lead to the adoption of a new rule that protects employees who have no reasonable belief that a Title VII violation has occurred, contrary to the statutory limits of the law. When considered in actual application, the objective reasonableness standard *protects* the reporting employee.

Pet. App. at 15a-16a (emphasis in original). Judge Niemeyer elaborated on the point in his opinion explaining why the *en banc* rehearing was denied.

> [T]here is no such tension because Jordan is comparing the qualitative requirement of being objectively reasonable when opposing unlawful practices with the laches concept discussed in *Faragher*. . . . Complaining employees are protected by Title VII once they have an *objectively reasonable belief* that a Title VII violation has occurred. On the other hand, if they want to protect their right to sue their employers, they have a reasonable amount of time in which to bring their concern to their employer's attention. These principles are not in tension with each other--they are simply different provisions with different conditions. Congress limited the scope of retaliation claims, and our

> decision in *Navy Federal* amply protects employees who reasonably err in understanding those limits. We have simply indicated our unwillingness to go beyond *Navy Federal* and use Title VII to create a national workplace civility code.
>
> As the law stands, Title VII does not create a claim for every employee who complains about the potential for Title VII violations or about other employees' isolated racial slurs. It protects an employee who opposes "any practice made an unlawful employment practice," 42 U.S.C. § 2000e-3(a), or who "reasonably believes" he is opposing a practice made an unlawful practice by Title VII, *Navy Federal*, 424 F.3d at 406.

Pet. App. at 52a-53a (emphasis in original).

Moreover, *Ellerth* and *Faragher* do not address the body of retaliation law that by 1998, when those two cases were decided, was well developed with the "reasonable belief" standard. Indeed, *Ellerth* and *Faragher* do not mention retaliation; nor can they be read in a vacuum. When being applied in a retaliation context, those cases must be read in conjunction with *Breeden*, which was decided later, and all of the retaliation cases that came before and after *Breeden*. Those retaliation cases also reflect a "policy," and, more importantly, a legislative imperative, requiring an employee seeking to establish a claim of retaliation to have opposed "unlawful" conduct or, at the least, to have had an objectively reasonable belief that the employer had engaged in a practice that violated Title VII. To expand the protection of section 704(a) any further, let alone to the point requested by Jordan, would eviscerate the statute's plain language and meaning.

If *Ellerth* and *Faragher* had, in fact, created a "policy" under which all employees who complain about nonactionable inappropriate conduct enjoy protection from retaliation, the Supreme Court presumably would have said so in *Breeden* and reached a different result. Faced with this reality, Jordan attempts to denigrate *Breeden* as precedent, arguing that *Breeden* could not possibly have meant what it says because, if it had, it would have "overturned" *Ellerth* and *Faragher*. *See* Pet. at 18. That is an unlikely result, Jordan argues, considering the "careful crafting" of those two decisions, *see id.*, thereby suggesting that *Breeden* was not so crafted, and ignoring the fact that *Breeden expressly* relied on *Ellerth* and *Faragher*. He also argues that, after *Breeden*, this Court restated the "policy" language from *Faragher* in *Suders,* confirming that "this Court did not intend in *Breeden* to overturn . . . *Ellerth* and *Faragher*." *See* Pet. at 18. But there was no need for *Breeden* to "overturn" *Ellerth* and *Faragher,* and *Suders* did not need to clarify *Ellerth* or *Faragher* in light of *Breeden*, because, as discussed above, there is no conflict.

Indeed, in the nine years since *Ellerth*, and the six years since *Breeden*, a time during which many retaliation cases have applied the "reasonable belief" standard in a hostile work environment context, there had been no reported decisions of which the respondents are aware (and Jordan has cited none)--until Judge King's dissent in this case--that even posited the conflict that Jordan sees as so stark and so dangerous as to warrant this Court's review.[6]

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[6] *See, e.g., Diamond v. United States Postal Serv.*, 2002 U.S. App. LEXIS 384, *10-12 (3d Cir. Jan. 4, 2002) (unreported) (co-worker's statement that "now he was going to have to shoot a coon in his barn" could not give rise to reasonable belief that hostile work environment was created); *Fogleman v. Greater Hazelton Health Alliance*, 2004 U.S. App. LEXIS 26861, *4-6 (3d Cir. Dec. 23, 2004) (unreported) (employee could not have had objectively reasonable belief that hostile sexual work environment existed based on her supervisor

The fact that the universally applied reasonable belief standard has worked harmoniously with *Ellerth* and *Faragher* for years compels the conclusion that there is simply no important issue raised by those two cases (or *Suders*) that needs to be addressed by this Court.

B. Burlington Northern.

Jordan also looks for support in this Court's recent opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S. Ct. 2405 (2006), decided after the first panel opinion in this case, and before the panel granted rehearing, arguing that *Burlington Northern* requires a broad reading of the statute, and compels the conclusion that Jordan's opposition was entitled to protection. *See* Pet. at 15. But *Burlington Northern* deals with a different issue. To establish a cause of action for retaliation, Title VII requires that a plaintiff allege that (1) he engaged in

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discussing the color of her underwear at staff meeting and two co-workers calling her names and teasing her); *Greene v. A. Duie Pyle, Inc.*, 2006 WL 694377 (4th Cir. Mar. 20, 2006) (*per curiam*) (unreported) (employee's belief that sexually explicit materials at worksite created hostile work environment was unreasonable as a matter of law); *Curd v. Hank's Disc. Fine Furniture, Inc.*, 272 F.3d 1039 (8th Cir. 2001) (employee could not have held reasonable belief that co-worker's routinely opening his pants in front of her to tuck in his shirt created unlawful hostile work environment); *George v. Leavitt*, 407 F.3d 405, 416 (D.C. Cir. 2005) (employee, who was from Trinidad and Tobago, could not have held reasonable belief that her complaint about three incidents involving co-workers telling her to "go back to where [she] came from" created abusive work environment). The petition cites one case that raises the alleged conflict, a district court opinion from Pennsylvania, but that case was decided after the publication of Judge King's dissent in this case, and relies on it. *See* Pet. at 15-16 n.10. And, in any event, the holding in that case was that the employee's belief that a hostile work environment was created by a co-worker's racist comment was, in fact, reasonable, *see Greene v. MPW Industrial Services, Inc.*, 2006 U.S. Dist. LEXIS 72421, *13-14 (D. Pa. Oct. 4, 2006), an issue not raised in Jordan's petition.

statutorily protected activity, (2) an adverse employment action occurred, and (3) the two were causally related. *Moore v. Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006). *Burlington Northern* addresses only the second element--whether the employer's action (reassignment and suspension of the employee without pay) constituted a retaliatory act--*i.e.*, whether the employer "discriminated against" the employee, in section 704(a) parlance. This case, on the other hand, deals with the first element--whether Jordan engaged in protected activity, which, as discussed *supra* in part I, implicates the "made . . . unlawful" language in section 704(a). Thus, whatever impact *Burlington Northern* may have had on the "discriminated against" language in section 704(a)--the second prong of a retaliation claim--it does not even mention the first prong, and does not support the reading of the statute proposed by Jordan.

The real relevance of *Burlington Northern* to this case, as Judge Niemeyer observed, is that it confirms the applicability of an objective standard in retaliation law jurisprudence. *See* Pet. App. at 13a. In *Burlington Northern*, this Court held that an employment action would be sufficiently adverse to satisfy the second prong of a retaliation claim when "a *reasonable employee* would have found the challenged action materially adverse." *Burlington Northern*, 126 S. Ct. at 2415 (emphasis added). The Court explained that it used the "reasonable" standard "because we believe that the provision's standard for judging harm must be objective" and because "[w]e have emphasized the need for objective standards in other Title VII contexts [citing *Suders* and *Harris*], and those same concerns animate our decision here." *Id.* Far from overruling *Breeden* with respect to reasonable belief, as Jordan suggests, *see* Pet. at 17, *Burlington Northern* emphasizes the applicability of an objective standard in all of Title VII. Thus, whether a hostile work environment in fact exists requires both a subjective

(from the employee's perspective) and an objective analysis of the workplace, *see Harris*, 510 U.S. at 22; and whether conditions are so intolerable as to create a constructive discharge calls for an objective review of the facts, *see Suders*, 542 U.S. at 141. The same reasonableness standard was expressly applied in *Breeden*. *Burlington Northern* provides no basis to question the reasonableness standard relied on by the court below, and no basis on which to argue that this Court's review is required.

III. JORDAN'S SECTION 1981 CLAIM WAS PROPERLY DISMISSED BECAUSE IT FAILED TO MEET THIS COURT'S PLEADING REQUIREMENTS.

The second question posed by Jordan's petition is whether a complaint that baldly alleges a discriminatory motive for an employment action must also allege facts to support that motive. *See* Pet. at (i). In arguing for review of that question, Jordan asserts that the Fourth Circuit improperly applied a "heightened" pleading standard to his claim of racial discrimination, in conflict with this Court's decision in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), and the notice pleading requirements of Rule 8(a). Pet. at 20. But, in doing so, Jordan simply mischaracterizes the decision below.

The Fourth Circuit did *not* hold that "a complaint resting on a straightforward assertion of an unlawful motive is insufficient as a matter of law," as asserted by Jordan. *See* Pet. at 19. Rather, the circuit court held that the complaint, taken as a whole, did not assert a claim because the specific facts alleged did not support, and in fact tended to refute, the general race-based allegation. *See* Pet. App. at 22a. Thus, the question posed by Jordan is not fairly presented by the opinion below, and certiorari is inappropriate for that reason

alone. *See, e.g.*, *Rogers v. United States*, 522 U.S. 252, 253 (1998) (dismissal of writ is appropriate where question is not fairly presented by the record).

Jordan's complaint contains a conclusory allegation of motive in one paragraph ("he was fired because he is African-American" and his "race was a motivating factor" in his termination), but he did not rest on that allegation. Rather he pointed to the 24 paragraphs of facts in his complaint that, he assured the court, would support his conclusion. *See* Pet. App. at 17a, 19a. In those paragraphs, Jordan recited a story of retaliation in which neither his race, nor the race of others in the workplace, are alleged to have been pertinent to his termination. Indeed, the complaint does not identify the races of Farjah or the supervisors involved in Jordan's termination. *Cf. Swierkiewicz*, 534 U.S. at 511 (complaint alleging age and national origin discrimination identified both age and nationality of most relevant persons).

Thus, Jordan's bald allegation of race-based motive is at odds with the substance of his complaint, in which he alleges, as the district judge observed, that he was "fired for reporting a racist remark, but [alleges] no facts suggesting that his own race played a role in his termination." *See* Pet. App. (Dist. Ct. Opin.) at 70a. On appeal, Jordan did not argue that his bald allegation was sufficient but, rather, that inferences of racial bias could be drawn from his 24-paragraph factual recitation to the effect that Jordan's managers "tolerated racist comments." *See* Pet. App. at 19a. But, as Judge Niemeyer correctly concluded:

> [T]hese new allegations are not fair inferences inasmuch as they are mere speculation and argument. It does not follow that a manager who does not fire an alleged racist is therefore himself a racist, and it does not follow that a racist who fires an employee

> did so because of his racism. There is also no basis in the complaint to conclude that Jordan, as a complaining black employee, was treated differently from a white complaining employee. Indeed, there is no suggestion that any employee other than Jordan complained to management about a racist comment.

Pet. App. at 23a. The problem with Jordan's section 1981 claim, then, is not that it says too little but, rather, that it says too much. By pointing to the alleged retaliation facts to support his race-based claim, Jordan demonstrated that he has no relevant facts, and even posited a different motive for his termination--one in which his race is not alleged to be a factor. And when invited by the district judge to amend to allege facts to support his race-based claim, he declined to do so. *See* Pet. App. at 23a.

The Fourth Circuit's consideration of the entire complaint, not just the pejorative allegation of discrimination, is not inconsistent with *Swierkiewicz*. In reviewing the sufficiency of the complaint in *Swierkiewicz*, this Court identified the facts that tended to support the plaintiff's conclusory allegation of national origin and age discrimination, noting that the complaint recited in "detail[] the events leading to his termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved in his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." *Id.* at 514 (internal citation omitted). In *Swierkiewicz*, then, this Court reviewed the entire complaint to test its sufficiency; the Fourth Circuit did the same thing here in considering Jordan's complaint.

Indeed, other circuit courts, applying *Swierkiewicz* and the pleading rules, have found, as did the Fourth Circuit,

that a complaint must be "view[ed] . . . as a whole, rather than any one statement in isolation." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285 (5th Cir. 2004). *See also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1253 n.11 (11th Cir. 2005) ("The placement of the paragraph in another count is unimportant to our review of a district court's order dismissing a complaint under Rule 12(b) of the Federal Rules of Civil Procedure. We read the complaint as a whole."). The Fourth Circuit properly considered all of Jordan's factual allegations in dismissing his section 1981 claim.

The panel majority correctly applied the *Swierkiewicz* standard, and review by this Court of this fact-bound issue is not necessary.

CONCLUSION

Jordan's petition raises no conflicts among the Circuits, or with decisions of this Court, and presents no important question of federal law requiring this Court's intervention. The petition should be denied.

Respectfully submitted,

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